(20)

No. 90-1156

Supreme Court, U.S.
FILED
OCT 9 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY BRIEF

HERSCHEL L. ABBOTT, JR.
DAVID G. RADLAUER
EDWARD H. BERGIN
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000

Of Counsel:

JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
SIDLEY & AUSTIN

REX E. LEE *
DAVID W. CARPENTER
THOMAS W. MERRILL
JOSEPH D. KEARNEY
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

THOMAS O. LIND
317 Baronne Street
New Orleans, LA 70112
(504) 595-2218

Counsel for Petitioner

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THIS CASE IS CONTROLLED BY *MP&L*, *NANTAHALA*, AND THEIR NUMEROUS PRECURSORS	3
A. FERC Has "Plenary Authority" To Determine Any Claims That NOPSI Was Imprudent In 1980 In Retaining Grand Gulf Power For Future Resale To Its Retail Customers	4
B. FERC Has Jurisdiction Over Claims Of "Imprudent" Omissions To Act	8
C. FERC Has Jurisdiction Over A "Buyer's" Prudence In An Integrated Power Pool	9
D. *Nantahala* And *MP&L* Do Not Prohibit The Recognition Of Wholesale Rate Reductions In Retail Rates	12
E. The *NOPSI III* Decision Has No Pertinence To This Case	13
II. THE COUNCIL HAS RELITIGATED THE VERY MATTERS THAT WERE BEFORE FERC AND HAS COLLATERALLY ATTACKED FERC'S ORDER	13
III. RESPONDENTS' *RES JUDICATA* CLAIMS ARE NOT BEFORE THIS COURT AND ARE, IN ANY EVENT, MERITLESS	17
CONCLUSION	19

TABLE OF AUTHORITIES

Cases — Page

Alliance for Affordable Energy, Inc. v. *Council of New Orleans*, 578 So. 2d 949 (La. App. 4th Cir. 1991), *certiorari granted* (La. Sup. Ct. Sept. 27, 1991) 18
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981) 16
Bishop v. *Wood*, 426 U.S. 341 (1976) 19
Chicago & N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) 4, 12, 15
FERC v. *Mississippi*, 456 U.S. 742 (1982) 6
FPC v. *Southern California Edison Co.*, 376 U.S. 205 (1964) 5
Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) 6
Kentucky West Virginia Gas Co. v. *Pennsylvania Public Utility Commission*, 837 F.2d 600 (3d Cir. 1988) 9
Massachusetts v. *United States*, 729 F.2d 886 (1st Cir. 1984) 11
Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ..... *passim*
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953 (1986) ..... *passim*
NOPSI v. *Council of New Orleans*, 491 U.S. 350 (1989) 13
Pennsylvania Water & Power Co. v. *FPC*, 343 U.S. 414 (1952) 8
Pike County Light & Power Co. v. *Pennsylvania Public Utility Commission*, 77 Pa. Commw. 268, 465 A.2d 735 (1983) 9
The Shreveport Rate Cases (*Houston, E. & W. Tex. Ry.* v. *United States*), 234 U.S. 342 (1914) 6
TWA v. *Thurston*, 469 U.S. 111 (1985) 17
Younger v. *Harris*, 401 U.S. 37 (1971) 13

Administrative Decisions

AEP Generating Co., 35 FERC (CCH) ¶ 61,226 (1986) 9

TABLE OF AUTHORITIES—Continued

Page

AEP Generating Co. and Kentucky Power Co., 38 FERC (CCH) ¶ 61,243 (1987) 9
Middle South Energy, Inc., FERC Opinion No. 234, 31 FERC (CCH) ¶ 61,305 (1985) 15

Statutes

Federal Power Act, 16 U.S.C. §§ 791-828
Section 201, 16 U.S.C. § 824 ..... 4, 5
Section 306, 16 U.S.C. § 825e 11, 14
15 U.S.C. § 79a(a) 5
28 U.S.C. § 1738 17
Louisiana Code of Civil Procedure
Art. 531 18
Art. 532 18

Miscellaneous

Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, No. 86-1970
Appellant's Reply Brief (filed Feb. 9, 1988) .. 2
Brief Of Appellee State Of Mississippi (filed Jan. 22, 1988) 2, 9
Brief Of Council Of City Of New Orleans As Amicus Curiae (filed Jan. 22, 1988) 2, 9
P. Bator, et al., *Hart And Wechsler's The Federal Courts And The Federal System* (3d ed. 1988) .. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1156

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

PETITIONER'S REPLY BRIEF [1]

Respondents and their *amici* admit the single fact that controls this case: The Council of the City of New Orleans ("Council") has barred NOPSI from recovering in retail rates—and thereby has "trapped"—over $135 million in the Grand Gulf costs that FERC found "just and reasonable" and ordered NOPSI to incur. As petitioner, FERC, and the Solicitor General previously demonstrated in detail, this single fact means that this case is squarely controlled by this Court's prior decisions in *MP&L*,[2] *Nantahala*,[3] and their numerous precursors.

Nantahala holds that this "trapping" of costs is prohibited. 476 U.S. at 965. It categorically states that a State may not do what the Council concededly has done: "exercise its undoubted jurisdiction over retail sales" to prevent a utility from "recovering the costs of paying the

---

[1] The Rule 29.1 Statement appears at p. ii of Petitioner's Brief.

[2] *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

[3] *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986).

FERC-approved rate." *Nantahala*, 476 U.S. at 970. *MP&L* applied this principle to the very Grand Gulf costs at issue here. It holds that retail ratemaking bodies are required by the Supremacy Clause to permit MP&L, NOPSI, and each other MSU operating company "to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power." *MP&L*, 487 U.S. at 373.

Indeed, *MP&L* categorically held that the Supremacy Clause prohibits any form of state prudence review when, as there and here, its "purpose . . . [is] to determine whether the costs FERC had directed [an MSU operating company] to pay for its allocation of Grand Gulf power should be 'trapped' [and borne by shareholders] or passed on to . . . retail customers." *Compare MP&L*, 487 U.S. at 372 & n.12, *with* Pet. Br. 13 (quoting Council's resolution). Thus, in *MP&L*, this Court rejected the arguments of Mississippi and of the Council as *amicus* that the Court should remand the case to allow the Mississippi PSC to "undertake" a prudence review. 487 U.S. at 372. The Court so held in the face of the parties' and the Council's statements that the Mississippi PSC could then have adopted the same "prudence" theories that the Council's Order adopts. *See* Pet. Br. 31-34 & n.39.[4] In short, no amount of revisionism (*see* Council Br. 39) can alter the fact that the Council's Order is preempted under the holding in *MP&L*.

The arguments of respondents and their *amici* confirm these points. Each argument that they advance was previously raised, and rejected, in *MP&L*, *Nantahala*, and

[4] *See* Brief Of Council Of City Of New Orleans As Amicus Curiae, *MP&L*, No. 86-1970, pp. 10-11 & 15-24 (filed Jan. 22, 1988); Brief Of Appellee State Of Mississippi, *MP&L*, No. 86-1970, pp. 25-26 & 34-37 (filed Jan. 22, 1988) (making Council's arguments based on "cost savings in other areas"); Appellant's Reply Brief, *MP&L*, No. 86-1970, pp. 18-19 n.22 (filed Feb. 9, 1988) (discussing Council's $135 million disallowance).

their precursors. Their position would further nullify "Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Nantahala*, 476 U.S. at 966; *see MP&L*, 487 U.S. at 373.

This Reply will be confined to three major points. Part I will demonstrate that the various jurisdictional claims of respondents and their *amici* are flatly contrary to *MP&L* and *Nantahala* and that the respondents' attempts to invoke the earlier *abstention* decision in this case are baseless. Part II will demonstrate that, like Mississippi's contentions in *MP&L*, the findings in the Council's Order are in conflict with FERC's actual and implicit determinations. Finally, Part III will show that respondents' *res judicata* arguments are barred by their failure to file a cross petition, and, in any event, are meritless.

I. THIS CASE IS CONTROLLED BY *MP&L*, *NANTAHALA*, AND THEIR NUMEROUS PRECURSORS.

What is most striking about the briefs of respondents and their *amici* is that they do not defend—but abandon—the ground for the Fifth Circuit's judgment: its holding that FERC has jurisdiction only over initial decisions to "participate" in a power pool project, but not over claims that utilities "acted [im]prudently" after construction of a wholesale plant was underway." J.A. 23, 25; Cert. App. 14A, 16A. Contrary to this holding, respondents and their *amici* now concede that FERC has exclusive jurisdiction over the "managerial prudence" of the construction and completion of Grand Gulf and over the reasonableness of the FERC-approved Grand Gulf rates. *E.g.*, Council Br. 36 n.54 & 42-43.

However, they make a series of arguments that would permit these principles to be evaded at will. In particular, although conceding that FERC has jurisdiction to determine whether it was imprudent for NOPSI to *have had* contingent interests in Grand Gulf power for resale to

retail customers, they claim that it is the Council, not FERC, that has jurisdiction to determine whether it was prudent for NOPSI to "*retain*" those interests in 1980. *See* Council Br. 33-34.

But it is elementary that the preemptive effects of federal regulatory schemes cannot be evaded through such "artful pleading." *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981). Here, moreover, respondents are urging a distinction without a difference. That is confirmed by the Council's repeated attempts to defend its disallowance order by asserting that the rates that FERC found to be "just and reasonable" are "catastrophically uneconomic." *E.g.*, Council Br. 13, 33. It is further confirmed by the fact that each of the essential findings in the Council's Order represents a factual claim that the Council could have presented to FERC in 1982 and that FERC implicitly or explicitly rejected. *See* pp. 13-17, *infra*.

However, the short answer to respondents and their *amici* is that the jurisdictional distinctions they propose are not only unsupported by the statute, but were *all* raised, and rejected, in *MP&L*, *Nantahala*, and their precursors. As FERC and the Solicitor General have confirmed (Br. 13-25), these economic issues are for FERC, not retail ratemaking bodies.

A. FERC Has "Plenary Authority" To Determine Any Claims That NOPSI Was Imprudent In 1980 In Retaining Grand Gulf Power For Future Resale To Its Retail Customers.

Respondents' principal claim is that recognition of FERC's jurisdiction to determine the "prudence" of NOPSI's Grand Gulf allocation is contrary to the terms and legislative history of the Federal Power Act. Council Br. 29-32; Alliance Br. 29-38. Respondents acknowledge that Section 201 gives FERC plenary authority to assure that the rates for wholesale sales of electricity in interstate commerce, and contracts affecting them, are "just

and reasonable." However, they rely on Section 201(a)'s proviso that FERC's jurisdiction "extend[s] only to those matters which are not subject to regulation by the States" and to various statements in the Act's legislative history to that same effect. In their view, if state regulation of the prudence of any aspect of NOPSI's purchases of Grand Gulf capacity would be constitutional under the Commerce Clause—as they claim the Council's Order is (*see* Council Br. 45)—it means that FERC has no jurisdiction to regulate it.

This very claim was rejected in *MP&L*. *Compare* 487 U.S. at 374 (Opinion for the Court), *with id.* at 387-88 (Brennan, J., dissenting) (citing same legislative history and same proviso in Section 201). *MP&L* reaffirmed this Court's earlier holding in *FPC* v. *Southern California Edison Co.* that FERC jurisdiction does not depend on a "case by case analysis of the impact of state regulation on the national interest." 376 U.S. 205, 215 (1964). *Southern California Edison Co.* held that this proviso in Section 201 is "merely a policy declaration . . . of great generality," that it "cannot nullify [Section 201's] clear and specific grant of jurisdiction [to FERC]," and that the proviso simply codified the "bright line" between state and federal authority that existed when the Federal Power Act was passed. *Id.* at 215-216. Under that line, FERC has plenary authority to determine any and all matters that relate to the reasonableness of interstate rates and the contracts and allocations that affect them. *Id.* at 216; *MP&L*, 487 U.S. at 374-75.

Indeed, rather than seek to preserve exclusive state regulation of some aspects of integrated interstate power pools (*see* Council Br. 31), Congress contemporaneously found in the Public Utility Holding Company Act that sales and exchanges of power within these pools "are not susceptible of effective control by any State." 15 U.S.C. § 79a(a).[5]

---

[5] In this regard, there is no substance to the Alliance's suggestion (Br. 44-45) that NOPSI's and the Solicitor General's claims some-

For these reasons, *MP&L*, *Nantahala*, and numerous prior decisions of this Court uniformly hold that FERC's jurisdiction preempts any state law, no matter how it is labeled, that would have the *effect* of interfering with FERC's regulation of wholesale rates and contracts affecting them. *See* Pet. Br. 28-29 & n.37. Here, as in *MP&L*, the decisive fact is that the effect of the Council's Order would nullify FERC's Order for the only purpose that matters in an integrated system—recovery of costs from the ultimate customers. Indeed, contrary to the Council's misstatements (*e.g.*, Br. 20), FERC recognized in its Orders—as New Orleans than argued (*see* Pet. Br. 8 & n.10)—that these FERC-mandated costs would have to be included in retail sales. *See MP&L*, 487 U.S. at 375.

Similarly, each of respondents' other claims proceeds from a misapprehension of the scope of FERC's jurisdiction and from a series of arguments that were raised and rejected in *MP&L* and *Nantahala*.

First, the Council is simply wrong in contending that FERC's jurisdiction is limited to "allocat[ing] the power and cost of Grand Gulf *among* the individual [MSU] operating companies" and to "establish[ing] their *relative* shares" of the plant's costs, even if those costs are "catastrophically uneconomic." Council Br. 19 (emphasis in original); *see id.* 13, 20. FERC's jurisdiction is not limited to allocating costs. It also determined the "just and reasonable" wholesale rate that each MSU company

how raise Tenth Amendment issues and that the Court should consider whether *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), should be "limited or overruled." The issue in this case is not whether Congress may "use state regulatory machinery to advance federal goals." *FERC* v. *Mississippi*, 456 U.S. 742, 759 (1982). Rather, as in *MP&L* and *Nantahala*, the question is whether Congress may limit a State's power to enter retail rate orders that have a direct effect on wholesale transactions in interstate commerce. That Congress has this power has been settled for eighty years. *See The Shreveport Rate Cases* (*Houston, E. & W. Tex. Ry.* v. *United States*), 234 U.S. 342 (1914).

must pay the owner of Grand Gulf (MSE) for electric capacity and energy. FERC thus has jurisdiction to determine whether costs of the plant were prudently incurred in constructing the plant and to exclude not merely "catastrophically uneconomic" costs, but any "uneconomic costs." *See* Pet. Br. 27-28.

Further, contrary to the Council's statements (Br. 7 & n.11, 44-45), it is entirely beside the point that decisions to construct and complete a plant can sometimes present different considerations than do decisions to sell off power from one plant and purchase power from another—which the Council inaptly analogizes to a sublease of "excess" office space. Br. 44-45.[6] As FERC and the Solicitor General have demonstrated, respondents have ignored that FERC has jurisdiction to determine claims that MSE, NOPSI, or the MSU system should have reduced their costs by selling off Grand Gulf power in 1980 and buying substitute power from some other source instead. *See* SG Br. 16-21; *see also* Pet. Br. 26-27 nn.31-35.

Contrary to the Council's contentions (Br. 33), FERC's regulation established that it was "just and reasonable" —in the only relevant "meaning of this phrase" (*id.*)— for NOPSI to obtain and retain 17% of Grand Gulf for resale to retail customers. The reality is that FERC authorized MSE to recover 100% of its Grand Gulf costs from NOPSI and other MSU companies. As *MP&L* recognized (487 U.S. at 362-64), FERC could do so only because it implicitly found not merely that the Grand Gulf construction costs were reasonable, but also that the MSU sys-

[6] The Council's "sublease" metaphor is inapt because it erroneously implies that NOPSI did not need the Grand Gulf power and would be better off if it were "subleased" out at whatever price the market would bear. That is false. NOPSI needs every megawatt of its Grand Gulf allocation, and it would have to acquire substitute power if it sold off Grand Gulf. Thus, the Council's Order assumes a sale of Grand Gulf power at the FERC rates—to a hypothetical "sucker" utility—and a purchase of substitute power at *lower* rates.

tem's *retention* of its 90% interest in Grand Gulf—and its failure to sell off any part of it—were a reasonable means to diversify fuel sources for the benefit of the system "as a whole." In allocating the power, FERC thus necessarily found that the nuclear capacity costs assigned to NOPSI and each other MSU operating company—roughly $800 per megawatt of average demand (*see* Pet. Br. 11 n.14)—were "just and reasonable," did not represent too great a concentration of nuclear capacity, and would not result in "excessive prices" for any class of power consumers. *See Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414, 418 (1952).

B. FERC Has Jurisdiction Over Claims Of "Imprudent" Omissions To Act.

Respondents nonetheless claim that FERC lacks jurisdiction to consider the allegations that it was "imprudent" for NOPSI to retain its then-contingent 17% Grand Gulf share in 1980, rather than "selling off" 8% of it and buying coal power instead. Respondents contend that FERC's authority is limited to reviewing wholesale transactions "*actually filed* with it for approval" and that FERC's jurisdiction cannot be "invoke[d]" where the allegation is that a utility imprudently "*failed* to engage in a transaction." Council Br. 34 (emphasis in original).

This is simply incorrect. FERC's jurisdiction extends to "anything done or *omitted to be done* by any . . . public utility." 16 U.S.C. § 825e (emphasis added); *see* Cert. App. 43A-44A. Indeed, respondents themselves elsewhere acknowledge that FERC routinely exercises jurisdiction to consider claims that a wholesale utility in an integrated system could have and should have reduced costs by selling off power from one source and buying power from a second source. Council Br. 36-37; *see* Pet. Br. 26-27 & nn.33-35; SG Br. 18 & n.9. In those instances, FERC is reviewing claims that, in the Council's words, a "*failure* to seek off-system sales" is imprudent. Council Br. 34 (emphasis in original).

C. FERC Has Jurisdiction Over A "Buyer's" Prudence In An Integrated Power Pool.

Finally, respondents and their *amici* also argue that FERC has no jurisdiction over NOPSI's prudence because NOPSI is a "buyer" of Grand Gulf power. They cite prior FERC statements to the effect that FERC "*generally*" disclaims any jurisdiction to consider the reasonableness of the purchaser's conduct (Council Br. 34), and they rely on the *Pike County* line of cases for the proposition that States can find a buyer imprudent when it voluntarily obtains a particular quantity of power from one source when there was a less costly alternative.[7]

These arguments, too, were made and rejected in *MP&L*.[8] There, all nine members of this Court recognized what FERC has repeatedly held: whereas FERC determines only the *seller's* prudence in an ordinary bilateral transaction, FERC necessarily determines the prudence of "buyer" and "seller" alike when, as here, the power supply arrangements are those of an integrated power pool.[9] In a pooling arrangement, every

---

[7] Brief Of The National Association Of State Utility Consumer Advocates As Amicus Curiae In Support Of Respondents, pp. 5-17; *see, e.g., Kentucky W. Va. Gas Co.* v. *Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600 (3d Cir. 1988); *Pike County Light & Power Co.* v. *Pennsylvania Pub. Util. Comm'n*, 77 Pa. Commw. 268, 273-74, 465 A.2d 735, 737-38 (1983); *see also Nantahala*, 476 U.S. at 972.

[8] *See* Brief Of Appellee State Of Mississippi, *MP&L*, No. 86-1970, pp. 14-15, 34-35 (filed Jan. 22, 1988); Brief Of Council Of City Of New Orleans As Amicus Curiae, *MP&L*, No. 86-1970, pp. 19-24 (filed Jan. 22, 1988).

[9] *MP&L*, 487 U.S. at 357, 363, 374-75; *id.* at 378 (Scalia, J., concurring); *id.* at 386 (Brennan, J., dissenting); *see AEP Generating Co.*, 35 FERC ¶ 61,226 (1986) & *AEP Generating Co. and Kentucky Power Co.*, 38 FERC ¶ 61,243 (1987).

member of the pool is simultaneously a "buyer" and a "seller," for the wholesale transaction is a "sale" of power from the pool to those utilities that belong to the pool.[10] Thus, *MP&L* held that FERC's Orders establish that it is "just and reasonable" for MP&L, NOPSI, and each other MSU company to purchase their allocated shares of Grand Gulf at the FERC-approved wholesale rate *for resale* to their retail customers. 487 U.S. at 363 & 375-76.

For the same reason, *MP&L* held that *Pike County* is inapposite to this case: "if the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for." *Id.* at 374-75. The Fifth Circuit agreed. Cert. App. 15A; J.A. 24.

These same considerations foreclose the Council's final argument based on NOPSI's putative status as a "buyer." Whereas the Council concedes that FERC has jurisdiction to decide if MSE (as the owner of Grand Gulf) should have engaged in off-system sales in 1980, the Council claims that FERC has no authority to determine if NOPSI should have sold off its then-contingent entitlements in the plant. Council Br. 35-38. That is wrong. The question of whether or when NOPSI could or should sell off contingent interests in an MSU system plant is governed by the MSU System Agreement—which is a binding FERC rate schedule—and epitomizes those matters that FERC has exclusive jurisdiction to decide. *See*

---

[10] For example, all members of the MSU pool transfer all the energy they generate to the pool and then effectively repurchase from the pool the power they need for retail operations, and the "price" each MSU company pays for power from the pool is directly related to the "price" it receives for transfers of power to the pool. FERC rate schedules thus govern all the sales and exchanges of power among MSU companies. *See MP&L*, 487 U.S. at 357, 376.

Pet. Br. 4-5 & 26-27. Indeed, under this FERC rate schedule, any sale of Grand Gulf could not occur unless NOPSI and the other MSU companies approve it (through the System Operating Committee), and these schedules and FERC's findings *prohibit* the unilateral sale by NOPSI that the Council has hypothesized. *See* Pet. Br. 4-5 & n.7; p. 15, *infra*.

The Council's contentions vividly confirm that it has redetermined matters within FERC's exclusive jurisdiction. The reality is that if NOPSI had engaged in the hypothesized off-system sales of its contingent entitlements to Grand Gulf in 1980, it would have been making a "sale of electric energy at wholesale in interstate commerce," which is within FERC's exclusive jurisdiction. 16 U.S.C. § 824(b)(1). Further, as FERC and the Solicitor General have demonstrated (Br. 24-25), if any off-system sales had been made in 1980, FERC would have thereafter determined whether and to what extent the benefit of such sales would have been allocated to NOPSI. Contrary to the Council's claims, the Council could not have entered an order in 1980 that compelled NOPSI to enter into the wholesale sales and allocated the benefit of those sales to NOPSI alone.[11] Such orders are plainly preempted by the Federal Power Act.[12] Nor can the

---

[11] The premise of the Council's Order is that it would have taken action to "protect" New Orleans's ratepayers "if only" the Council had known in 1980 that NOPSI had then committed to a 29.80% share of Grand Gulf. *See* Council Br. 8; J.A. 136-41. But the action the Council says it would have taken—ordering a sale of all but 9% of NOPSI's then-contingent interest—was beyond the Council's jurisdiction. *See* n.12, *infra*. Further, FERC's subsequent decision regarding AP&L establishes that NOPSI would not have realized the hypothesized savings even if it had engaged in the hypothetical purchases and sales in 1980. *See* Pet. Br. 41-42; S.G. Br. 24-25.

[12] *Massachusetts* v. *United States*, 729 F.2d 886, 887 (1st Cir. 1984) (Breyer, J.) (state commission may not order a utility to enter into a wholesale transaction; rather, a state's exclusive remedy

Council impose a sanction on a utility for having failed to engage in such wholesale transactions. *See Kalo Brick*, 450 U.S. at 324-27.

D. *Nantahala* And *MP&L* Do Not Prohibit The Recognition Of Wholesale Rate Reductions In Retail Rates.

There is similarly no substance to respondents' contentions that FERC's and the Solicitor General's positions would prohibit the Council from adjusting NOPSI's retail rates if NOPSI hereafter sold off some portion of its Grand Gulf allocation. *See* Council Br. 20, 38-39. In that event, rate schedules would be filed with FERC to authorize the off-system sale. Those modified rate schedules would further determine what effect, if any, the sale by NOPSI would have on NOPSI's and the other MSU companies' relative shares of Grand Gulf and on the costs each MSU company would incur under the FERC rate schedule.

Contrary to the Council's claim, petitioner's and the Solicitor General's position would require that *any* resulting savings to NOPSI immediately be reflected in reductions to NOPSI's retail rates. As *Nantahala* and *MP&L* hold, the filed rate doctrine requires only that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala*, 476 U.S. at 965; *MP&L*, 487 U.S. at 373. If the FERC rate schedules are modified such that a utility's purchased-power expenses are reduced, the utility's retail rates may be, and should be, reduced dollar-for-dollar. *See Nantahala*, 476 U.S. at 967-68. These principles underscore that the question whether wholesale rates and costs are to be effectively reduced is a question for FERC, not for retail ratemaking bodies.

---

is to file a complaint with FERC asking *it* to compel the transaction).

E. The *NOPSI III* Decision Has No Pertinence To This Case.

Finally, as demonstrated in detail in Petitioner's Brief (pp. 35-36), there is no substance to the claims that this Court overruled *MP&L* and *Nantahala*, *sub silentio*, in its earlier abstention decision in this case. *See NOPSI* v. *Council of New Orleans*, 491 U.S. 350 (1989) (*"NOPSI III"*). The most this Court held is that the Council's Order is not "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph" for abstention purposes. *See id.* at 366-67.

Contrary to respondents' claims, this Court's prior decisions establish that such *abstention* holdings are *not* a decision that the Council's Order is "valid on its face."[13] Indeed, in *NOPSI III*, this Court remanded the case for a determination of that very question. *NOPSI III*, 491 U.S. at 353, 372-73. Further, while only this Court can know what it meant in *NOPSI III*, the language that respondents quote, by its terms, does no more than reflect the fact that *"generally"* prudence investigations of a utility's failure to diversify its power sources are outside FERC's jurisdiction and that state investigations are not "patently" illegal. But, as *MP&L* holds, those investigations are nonetheless facially illegal when FERC orders power purchases within integrated pools. *See* Pet. Br. 36 n.43 & pp. 9-12, *supra*.

II. THE COUNCIL HAS RELITIGATED THE VERY MATTERS THAT WERE BEFORE FERC AND HAS COLLATERALLY ATTACKED FERC'S ORDER.

Respondents have also sought to defend the Council's Order by alleging that the Council did not decide any prudence claims that were actually determined by FERC.

---

[13] *See Younger* v. *Harris*, 401 U.S. 37, 53-54 (1971) (rejecting claim of flagrant illegality) & *id.* at 51-52 (holding facial challenge can be litigated thereafter); P. Bator, et al., *Hart And Wechsler's The Federal Courts And The Federal System*, pp. 1402-03 & n.7 (3d ed. 1988).

Council Br. 33-38, 43-48. However, *MP&L* held that the "preemptive effect of FERC jurisdiction" does not depend on "whether a particular matter was actually determined in the FERC proceeding." *MP&L*, 487 U.S. at 374. Even if specific prudence claims were not "decided," "states may not regulate in *areas* where FERC has properly exercised its jurisdiction." 487 U.S. at 374 (emphasis added).

But that is precisely what the Council has done. Contrary to its suggestions (Br. 15-16 & 33-34), the Council has not based its prudence disallowance on any findings that NOPSI had opportunities to achieve cost savings by making off-system sales *after* FERC's Grand Gulf allocation was finalized in 1985.[14] Instead, the Council reviewed the very facts and Grand Gulf decisionmaking that were before FERC, and made determinations that are inconsistent with FERC's in three critical rspects.

First, as the Council does not dispute, the linchpin of the Council's Order was its finding that the MSU system's 1980 Grand Gulf cost estimates were wrong. J.A. 132-34 & 171-208. That estimate, however, was not only before FERC (Pet. Br. 8), but was also the basis for MSU's contention, and FERC's implicit findings, that it was prudent for the MSU system to construct and complete Grand Gulf. *See MP&L*, 487 U.S. at 363. By disallowing over $135 million of NOPSI's FERC-mandated costs on the ground that the MSU system's 1980 cost estimates were "imprudent," the Council has imposed sanctions on conduct that FERC had jurisdiction to declare unreasonable

[14] Although the issue is not presented here, the law is clear that if NOPSI were imprudently to forgo a future opportunity to sell off Grand Gulf power and to replace it with lower-cost coal power, the Council's remedy would be to file a complaint with FERC that challenges this "omi[ssion]" under Section 306 of the Act. Cert. App. 43A-44A. That would enable FERC to decide whether the FERC rate schedules would permit the unilateral wholesale sale, whether it was imprudent not to make it, and, if so, whether the benefits of the hypothetical wholesale transaction should be shared among the other MSU companies, or allocated to NOPSI alone. *See* SG Br. 24-25.

and on grounds that could have been, and should have been, raised before FERC. *See Kalo Brick*, 450 U.S. at 324.

Second, the Council's Brief confirms that it has engaged in the same collateral attacks on the MSU system's integrated capacity planning that this Court held were improper in *MP&L*. *Compare* Pet. Br. 40-41, *with* Council Br. 45-48. The Council acknowledges (Br. 3 n.2 & 48) that the terms of the pertinent FERC rate schedule (the 1973 System Agreement) prohibited NOPSI from unilaterally selling off Grand Gulf power. *See* Pet. Br. 5 & n.7. Further, FERC has rejected the Council's claims that individual MSU companies ever proceeded unilaterally without obtaining the required system approval. *See* 31 FERC at 61,651.

More fundamentally, as this Court held in *MP&L*, FERC's Order rested on its finding that the MSU system's acquisition and retention of its 90% interest in Grand Gulf were "appropriately approach[ed]" on a "system-wide basis," and FERC specifically "rejected" claims based on "local conditions" and the "needs of any one of the operating companies." *MP&L*, 487 U.S. at 376.

In short, the differences between FERC and the Council are not "just a quarrel with the facts." Council Br. 48. By finding that "[s]ystem-wide planning . . . was never deemed inconsistent with the companies taking individual action to achieve a mix of power sources" and that NOPSI should have unilaterally sold off Grand Gulf power in light of local conditions (Council Br. 48), the Council has contradicted FERC's explicit findings and redetermined matters that are in FERC's exclusive jurisdiction.[15]

[15] In this regard, the Council's numerous allegations (*e.g.*, Br. 6 n.9, 12 n.16, 46 & n.68) that NOPSI has insufficient coal-fired capacity relative to other MSU companies are irrelevant to the issue whether NOPSI was "imprudent" in retaining its 17% *Grand Gulf* allocation. FERC allocated Grand Gulf capacity in order to give each MSU company the same nuclear capacity costs per unit of

Third, respondents do not even respond to NOPSI's and the Solicitor General's demonstration that the Council has collaterally attacked FERC's cost allocations. Respondents do not dispute that the FERC Orders *rejected* a claim of the Arkansas parties that is virtually identical to the claim New Orleans would have made if NOPSI had engaged in the 1980 wholesale transactions that the Council hypothesized. *Compare* Pet. Br. 41-43 & SG Br. 24-25, *with* Council Br. 47-48. Nor can respondents dispute that the Council's Order rests on the impermissible "speculation" that FERC would have departed from these cost allocation principles in 1985 if NOPSI had engaged in the hypothetical purchases and sales five years earlier. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 579 (1981).

Against this background, it is irrelevant for purposes of this case whether the Council's findings are supported by evidence (as the Council claims, *e.g.*, Br. 19, 23-25, 43) or are contrivances (as the District Court and NOPSI have elsewhere suggested). The point is that the Council and FERC have made very different determinations about the reasonableness of the MSU system decisions that led NOPSI (and each other MSU company) to have nuclear capacity costs of roughly $800 for each megawatt of average demand. *See* Pet. Br. 11 n.14.

The question in this case is not who is right or wrong about the reasonableness of these choices. Nor is it

---

demand, and FERC found this allocation "just and reasonable" for each MSU company, *regardless* of whether the MSU company satisfied the *remainder* of its customers' demand with oil-fired, gas-fired, or coal-fired capacity. *See* Pet. Br. 9-12 & n.14. Thus, even if the Council could have jurisdiction to find NOPSI imprudent for failing to do what other MSU operating companies did—to acquire coal power *in addition to* their Grand Gulf allocations—the Council has no jurisdiction to disallow NOPSI's Grand Gulf costs. Further, the reason the Council has not sought to disallow any of NOPSI's non-nuclear costs is—as FERC found—that there are no significant disparities in non-nuclear costs among the MSU companies. *See* Pet. Br. 12.

whether the Council's findings are plausible. It is who has jurisdiction to make these determinations: FERC or each of five retail regulatory commissions? As *MP&L* and *Nantahala* hold, the answer is very clear. These are matters within FERC's exclusive jurisdiction and the Council's contrary determinations are thus preempted.

III. RESPONDENTS' *RES JUDICATA* CLAIMS ARE NOT BEFORE THIS COURT AND ARE, IN ANY EVENT, MERITLESS.

Finally, respondents argue that this Court should not decide the preemption question, but should "*reverse*[] [the Fifth Circuit's decision] with the direction that the district court's judgment should be vacated and the action dismissed." Council Br. 48 (emphasis added); *see also* Alliance Br. 97 (seeking "remand, with an instruction to stay in favor of the pending state court proceedings"). The basis for this claim is respondents' allegation that a November, 1989 judgment of a Louisiana state trial court was *res judicata* on all the issues in this case under state law and that 28 U.S.C. § 1738 thus prohibited the District Court from deciding the merits of NOPSI's "facial" preemption claim and required dismissal or stay of the entire case.[16]

Although respondents' Setcion 1738 claim was properly rejected by both lower courts, the short answer is that this claim is foreclosed by respondents' failure to file a cross-petition for certiorari. Although "[a] prevailing party may advance any ground in support of a judgment in his favor," it is well established that "[a]n argument that would modify the judgment . . . cannot be presented unless a cross-petition has been filed." *TWA* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985). Both re-

---

[16] 28 U.S.C. § 1738 requires that federal courts give state court proceedings "the same full faith and credit . . . as they have by law or usage in the courts of such State."

spondents are seeking modifications of the Fifth Circuit's judgment.

Further, respondents' claims are wholly inappropriate for review and are baseless. First, the November, 1989 Louisiana trial court judgment has now been superseded by the decision of the Louisiana Court of Appeal. *Alliance for Affordable Energy, Inc.* v. *Council of New Orleans*, 578 So. 2d 949 (La. App. 4th Cir. 1991), *certiorari granted* (La. Sup. Ct. Sept. 27, 1991). And *that* decision ultimately concluded that there was no facial preemption because it gave *res judicata* effect to the Fifth Circuit's facial preemption holding. *Id.* at 965-66. In short, respondents would have this Court direct the Fifth Circuit to give preclusive effect to a state court decision that in turn gives preclusive effect to the Fifth Circuit's decision now before the Court.

Second, respondents' claims rest on *lis pendens* provisions of the Louisiana Code of Civil Procedure that are inapplicable to this case by their own terms.[17] As both the District Court and the Fifth Circuit concluded, the question of the preclusive effect of the November, 1989 state trial court judgment is governed by the provisions of Louisiana law dealing with *res judicata*, and these provide that the state trial court judgment is not *res*

[17] The Louisiana *lis pendens* provisions consist of two paired provisions, Louisiana Code of Civil Procedure art. 531 and art. 532. By their terms, neither of these statutes applies to the current situation. Article 531 addresses the situation when "two or more suits are pending in a *Louisiana court or courts.*" (Emphasis added.) That is not the situation here, where one suit (really three consolidated suits) is pending in the state courts, and another is pending in the federal courts. Article 532 *is* addressed to the situation where "a suit is brought in a Louisiana court while another is pending in a court of . . . the United States." But Article 532 is expressed in terms of a grant of discretionary authority to Louisiana courts. It allows a Louisiana court to "stay all proceedings in the second suit until the first has been discontinued or final judgment has been rendered." Unlike Article 531, it does not direct the Louisiana courts to give preclusive effect to any prior decision.

judicata under Louisiana law because the state appellate process is not yet complete. *See* Pet. Br. 17 n.21; *accord* Alliance Br. 90 n.20. There is no basis for this Court to depart from its practice of accepting the construction of state law that has been adopted by both of the courts below. *See Bishop* v. *Wood*, 426 U.S. 341, 346 (1976).

CONCLUSION

For these reasons, and those set forth in Petitioner's Brief, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and the case should be remanded for entry of judgment for NOPSI.

Respectfully submitted,

HERSCHEL L. ABBOTT, JR.
DAVID G. RADLAUER
EDWARD H. BERGIN
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000

Of Counsel:
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
SIDLEY & AUSTIN

REX E. LEE *
DAVID W. CARPENTER
THOMAS W. MERRILL
JOSEPH D. KEARNEY
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

THOMAS O. LIND
317 Baronne Street
New Orleans, LA 70112
(504) 595-2218
Counsel for Petitioner

October 9, 1991

* *Counsel of Record*